

National Science Foundation

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subpoena for compliance if it is less than ten days after service.

§ 681.21 Who pays the costs for a subpoena?

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of NSF, a check of fees and mileage need not accompany the subpoena.

§ 681.22 Are protective orders available?

(a) A party or prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had;
- (2) That the discovery may be had only on specified terms and conditions;
- (3) That the discovery may be had only through a method of discovery other than requested;
- (4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;
- (5) That discovery be conducted with no one present except persons designated by the ALJ;
- (6) That the contents of the discovery be sealed;
- (7) That a deposition after being sealed be opened only by order of the ALJ;
- (8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or
- (9) That the parties simultaneously file specified documents or information

enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 681.23 How are documents filed and served with the ALJ?

(a) Documents filed with the ALJ must include an original and two copies. Every document filed in the proceeding must contain a title (e.g., motion to quash subpoena), a caption setting forth the title of the action, and the case number assigned by the ALJ. Every document must be signed by the person on whose behalf the paper was filed, or his or her representative.

(b) Documents are considered filed when they are mailed. The date of mailing may be established by a certificate from the party or its representative, or by proof that the document was sent by certified or registered mail.

(c) A party filing a document with the ALJ must, at the time of filing, serve a copy of such document on every other party. When a party is represented by a representative, the party's representative must be served in lieu of the party.

(d) A certificate of the individual serving the document constitutes proof of service. The certificate must set forth the manner in which the document was served.

§ 681.24 How is time computed?

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government are excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 681.25 Where is the hearing held?

The ALJ will hold the hearing in any judicial district of the United States:

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(a) In which the defendant resides or transacts business; or

(b) In which the claim or statement on which liability is based was made to NSF; or

(c) As agreed upon by the defendant and the ALJ.

§ 681.26 How will the hearing be conducted and who has the burden of proof?

(a) The ALJ conducts a hearing in order to determine whether a defendant is liable for a civil penalty, assessment, or both and, if so, the appropriate amount of the penalty and/or assessment. The hearing will be recorded and transcribed, and the transcript of testimony, exhibits admitted at the hearing, and all papers filed in the proceeding constitute the record for a decision by the ALJ.

(b) NSF must prove a defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) A defendant must prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

§ 681.27 How is evidence presented at the hearing?

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where he or she deems appropriate.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence shall be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

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§ 681.28 How is witness testimony presented?

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 681.19.

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.

(d) The ALJ shall permit the parties to conduct such cross examination as may be required for a full and true disclosure of the facts.

(e) Upon motion of any party, the ALJ shall order witnesses excluded from the hearing room so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 681.29 Will the hearing proceedings be recorded?

The hearing will be recorded and transcribed. The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.